

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LEE OCHOA,

Defendant and Appellant.

B209158

(Los Angeles County  
Super. Ct. No. TA084621)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Lee Ochoa appeals from the judgment entered after a jury convicted him of two counts of attempted willful, premeditated, and deliberate attempted murder, two counts of shooting at an occupied vehicle, and one count of being a felon in possession of a firearm.<sup>1</sup> (Pen. Code, §§ 664/187, subd. (a), 664, subd. (a), 246, 12021, subd. (a)(1).)<sup>2</sup> It also found that he personally used and discharged a firearm during the commission of the attempted murders. (§§ 12022.53, subds. (b) and (c).) Defendant admitted suffering a prior serious felony conviction and serving a prior prison term. (§§ 667, subd. (a), 667.5, subd. (b).) He appeals, contending the court erred by allowing the prosecution to present evidence of a gun that was found near the family residence and the evidence is insufficient to support the jury's finding that the attempted murders were premeditated. Both contentions were raised in his brothers' earlier appeal, and defendant offers no new arguments.<sup>3</sup> Viewing the evidence anew, we reach the same conclusion as before: that neither contention has merit. Accordingly, we affirm the judgment.

## FACTS

We take the factual summary presented in the earlier appeal.

Sesar Lomeli testified that at approximately 8:00 p.m. on May 7, 2006, he and Jonathan Aguilar dropped off a friend on 137th Street in Compton. As Aguilar stood outside of Lomeli's truck, Lomeli saw a male carrying a rifle coming toward the back of his vehicle. Aguilar left the location. Lomeli saw the male getting closer, causing him to drive away. As he did so, he heard approximately six or seven gunshots strike his truck.

---

<sup>1</sup> Defendant was jointly tried with his brothers Marcus and Jesse. Their convictions were affirmed in a prior unpublished opinion. (*People v. Ochoa* (Aug. 21, 2008, B200446, B202220).)

<sup>2</sup> All further undesignated statutory references are to the Penal Code.

<sup>3</sup> We shall refer to the brothers collectively as the defendants and to defendant's brothers individually by their first names.

The truck's back window was shattered. Bullets struck the radio, the front window, and the bumper. Another went through the air conditioner and exited through the hood.

Lomeli described the male with the rifle as "chunky," "not that tall," and wearing a black hooded sweater. He guessed the male was Hispanic based on his complexion. Lomeli did not see where he came from. He said that no one else approached his vehicle.

Lomeli drove home from the scene of the shooting and contacted police about a half hour after the incident. After he told police what had occurred, officers took a video of his truck. Later, Lomeli was taken to 137th Street and Wilmington for a field showup. After being admonished that the suspects might or might not be present, he saw five individuals. He recognized the person who had approached his truck with a rifle. Lomeli identified him based on his build, and noted that at the time of the showup he was no longer wearing the black hooded sweater. At trial, Lomeli did not recognize any of the defendants.

Lomeli denied telling police at the showup that he was able to identify two individuals. He testified he did not see anyone in a wheelchair at the scene of the shooting or at the showup.<sup>4</sup> He denied telling police he saw a person in a wheelchair on the street at the time of the shooting.

Lomeli recounted that he learned about two threats. He was with Aguilar when Aguilar received a phone call and was told not to appear in court because "they" would come after him if he did. When Lomeli arrived at home shortly thereafter, his mother informed him that a caller told her the people in jail had family. The caller warned that if the witnesses appeared in court their families would be in danger. Lomeli admitted the threats caused him to fail to appear in court even though he had been subpoenaed and that a warrant for his arrest was issued to procure his appearance.

Jonathan Aguilar stated that on May 7, 2006, he was on 137th Street in Compton. At about 8:30 p.m., he was sitting in Lomeli's Blazer. Lomeli had dropped off a friend and had turned the vehicle around. Lomeli asked Aguilar to close a window near the

---

<sup>4</sup> Marcus is confined to a wheelchair.

back of the truck. Aguilar got out of the vehicle and saw someone wearing all black and carrying a long rifle run toward the driver's side of the Blazer. As Aguilar stood on the passenger side of the truck, he could hear the man with the rifle and Lomeli screaming, but Aguilar did not pay attention to what they were saying. Aguilar heard a female (or females) say, "It's okay[.] [N]o, they are friends, no, Lee, no Jesse." Lomeli drove the truck away, and as Aguilar ran toward some apartments he heard seven to eight gunshots. Aguilar believed he heard two different guns firing based on the sound and repetition of the gunshots. He did not see anyone in a wheelchair in the vicinity of the shooting.

About a half hour later, Aguilar spoke to police officers. They took him to a location and conducted a field showup. After being admonished that he might or might not see the suspects, he was able to recognize one person because of his long hair. Aguilar saw that person approach Lomeli's truck carrying a small gun. Aguilar did not see that man shoot his weapon. He denied telling officers that he was able to recognize any other suspect at the showup. In court, Aguilar did not recognize any of the defendants as having been present on the night of the shooting.

Aguilar testified that on one occasion he was at a family member's house when his phone rang. The person on the line said they knew where he lived, so he should not appear in court. The caller said that if he came to court, they would come and "get" him. Aguilar was scared and worried by the call.

Los Angeles County Deputy Sheriff Anthony Meraz spoke to Aguilar and Lomeli after receiving a call reporting a shooting. Aguilar reported that he and Lomeli had driven to a party at 137th Street and Wilmington Avenue in Lomeli's sport utility vehicle. Lomeli parked and Aguilar exited the passenger side. Two male Hispanics approached on foot and shot at them with either rifles or shotguns. Aguilar told Meraz that just prior to the shooting he heard a female voice say, "No, it's okay, they're our friends[.] [N]o, Jesse. No, Lee." Meraz testified that Lomeli gave him the same information regarding the shooting as Aguilar had.

After speaking to the two men, Meraz and his partner videotaped Lomeli's vehicle. The tape was played for the jury. Meraz pointed out two bullet holes in the

vehicle, one in the tailgate and another in the rear window. Meraz said that two bullets traveled through the passenger compartment. One struck the center of the dashboard and the other hit the front windshield.

Meraz was present when Aguilar and Lomeli participated in a field showup. He told them they were under no obligation to identify anyone and that it was equally important to identify the guilty suspects and to exonerate those who were innocent of any wrongdoing. Each identified Jesse and defendant as a shooter.

That same day, Ivan Jimenez drove his friends Jorge Garcia and Ricardo to Wilmington Avenue in the City of Compton. After his passengers got out of the car, Jimenez parked. A Hispanic male wearing what Jimenez called a “hooded sweater” approached and told Jimenez to move his car because it was blocking the driveway. Jimenez performed a U-turn and parked on the opposite side of the street.

As Jimenez sat in the parked car, a female and a male carrying a large rifle approached on the driver’s side of his vehicle. They walked in front of his car and toward a truck parked across the street. Jimenez said the male could have been the same person who told him to move his car, as he was also Hispanic, seemed to have the same build, and appeared to be wearing the same black hooded sweater. Jimenez was not sure what kind of rifle the man had, although he acknowledged he might have told police the rifle was an AK-47 with a banana clip.

The man stood behind the truck and began firing at the vehicle. The female ran back in Jimenez’s direction, stood in front of his car, and called for somebody to shoot him. He looked in the rear view mirror and saw two or three men coming at him with guns. He was unable to describe the men because they were too far away. As soon as Jimenez heard the first shot, he ducked and left the scene. He stated that he might have hit the female who was standing in front of his car. As Jimenez drove away, he was struck in the left lower back. However, nothing penetrated the skin.

He testified that with the exception of the front windshield, all of the windows in his car were broken and bullet holes were “everywhere” in his vehicle. When Jimenez was about a block from the scene of the shooting, he stopped and called Jorge Garcia

(one of the people Jimenez had dropped off) with his cellular phone. He picked up Garcia, who told him to contact the police. Jimenez did so.

Police officers took Jimenez to look at some individuals. He could not remember what the officers said to him before he viewed the people but he knew they wanted to determine if he could identify the suspects. He told police he did not recognize any of the people he was shown. They were wearing different clothes from those he remembered from the scene of the shooting. He denied telling police that he recognized the man with the shaved head, the man with the long ponytail, and the man in the wheelchair.

Jimenez testified he did not see a man in a wheelchair shoot at him with a shotgun, and denied saying that to police. He claimed he told police that his friend had mentioned that a man in a wheelchair was passing around a shotgun. At trial, Jimenez did not recognize any of the defendants. He admitted he received a phone call from a person who said “they” knew where his family lived and told him not to come to court. He acknowledged he felt “threatened” and was concerned about testifying.

Los Angeles County Sheriff’s Sergeant Robert Gray spoke to Jimenez on the night of the shooting. Jimenez said he was parked in front of the driveway at 825 137th Street. A male Hispanic wearing a black hooded sweatshirt came out of the yard at that location and approached him. Jimenez told Gray the male was about 20 to 25 years old and had a shaved head, goatee, and a tattoo on his neck. The male told Jimenez to move his vehicle, and he complied by making a U-turn and parking on the other side of the street. Jimenez said the same male came toward him armed with an AK-47 type rifle and began firing. Jimenez reported that a female ran in front of his car, blocked his exit, and began yelling for someone to bring the guns over. Jimenez saw a person in a wheelchair with a shotgun and another male with a ponytail exit the yard at the 825 address. He saw the male with the ponytail grab the rifle from the man in the sweatshirt. The man with the ponytail and the man in the wheelchair shot at Jimenez, who stepped on the accelerator and left the location.

Gray testified that at the field showup, Jimenez identified Jesse as the man with the ponytail and defendant as the man with the shaved head. Gray told the jury defendant

had three tattoos on his neck. Gray said Jimenez later identified Marcus as the man in the wheelchair.

Maria Garcia testified that on May 7, 2006, she was in the back seat of a car with some friends on 137th Street when she heard gunshots. She ducked down to avoid being shot. A man in a wheelchair approached the driver's side of the vehicle carrying a large pistol. He told her to "[g]et the hell out of here or I'm going to shoot you." The man broke out the rear window of the car. Garcia jumped into the front seat and tried to drive away but she could not locate the keys. She asked the man how he expected her to leave if she did not have the keys to the car, and he told her to get out and leave. Garcia exited the car and walked away. She said the man did not shoot at her. Garcia spoke to police about five minutes after the incident. They took her to a location and conducted a field showup. She told officers that she recognized Marcus. In court, she identified Marcus as the man with the gun who approached in the wheelchair, told her to leave, and threatened to shoot her.

On the evening of the shooting, Deputy Larry Ordinario responded to 137th Street. He had received information that one of the suspects was a male Hispanic in a wheelchair. When Ordinario arrived, he saw Marcus traveling in the wheelchair and detained him. He swabbed Marcus's hands for the presence of gunshot residue.

Deputy Alejandro Gonzalez arrived at the scene of the shooting on 137th Street at about 9:35 p.m. He spoke to Maria Garcia, who told him that three males walked up to the vehicle she was in and began shooting. She said that one of the three shooters was in a wheelchair. Garcia told the deputy that the man in the wheelchair told her to get the hell out of there or they would kill her. She said the man in the wheelchair had a shotgun and the other two had handguns. Garcia was able to get out of her car and take cover when the shooters noticed two other vehicles parked nearby. She saw the three men, two running and one rolling in a wheelchair, chase after the two vehicles and fire at them. The men then went into the residence at 825 137th Street.

After Gonzalez spoke to Garcia, the house at 825 137th Street was contained. All of the residents of the home were instructed to come out to allow the deputies to

determine whether the suspects were still inside. Approximately eight to 10 people came out of the house. Gonzalez identified defendant and Jesse as two of the people who exited the residence. He did not see Marcus at the location, nor did he see a person in a wheelchair leave the residence.

Gonzalez saw the vehicle Maria Garcia was in at the time of the shooting. He observed that the rear window was shattered. The deputy recovered live bullets and casings from shotgun shells and high powered rifle rounds along the street and sidewalks of 137th Street. Later testimony established that the rifle rounds and casings were of the caliber commonly used in assault rifles, such as an AK-47.

After the witnesses were interviewed and the field showups were conducted, deputies searched the home at 825 137th Street pursuant to a warrant. No rifles or shotguns were found in the house. In a trash can on the west side of the house, Sergeant Gray found a small locked safe lying on top of the garbage in the can. Inside the safe, he found a nine-millimeter handgun and three magazines that fit the gun. Gray acknowledged that no nine-millimeter shell casings were found on the street where the shootings took place.

Christine Pinto, a criminalist with the Los Angeles County Sheriff's Department, analyzed the gunshot residue test sample taken from Marcus's hands and discovered one particle unique to gunshot primer residue and one particle consistent with gunshot residue. She informed the jury that a person who had gunshot residue particles on his hands could have fired a gun, touched a gun or other surface containing gunshot residue, or been in close proximity to a fired weapon. She was unable to tell the jury how Marcus came to have gunshot residue particles on his hands.

Three audiotapes were played for the jury. The first was a 911 call that lasted approximately seven minutes. The second was a three-minute recording of a conversation at the county jail between Jesse and his sister Marie. The third was an 11-minute recording of a conversation at the county jail between defendant and his girlfriend Elizabeth Estrada.



During the conversation between Jesse and Marie, Jesse claimed he knew the names of five witnesses who had spoken to the police. During the conversation between defendant and Elizabeth, he spoke about trying to dissuade witnesses from appearing in court.<sup>5</sup>

Defendant did not call any witnesses.

## **DISCUSSION**

### **I. The Admission of the Gun**

Defendant contends the trial court erred by allowing the prosecution to present evidence relating to the handgun Sergeant Gray found in the safe. He asserts the evidence was more prejudicial than probative and should have been excluded pursuant to Evidence Code section 352. We disagree.

Prior to admitting the evidence, the trial court held a hearing pursuant to Evidence Code section 402. The prosecution argued the discovery of the gun was relevant, as it tended to show that the defendants knew police would be arriving at their home and discarded the gun in an attempt to destroy evidence. The defendants pointed out that the witnesses claimed the shooters used either rifles or shotguns, not handguns. They argued there were no nine-millimeter rounds or casings found on the street. They complained that the admission of a gun unconnected to the shootings was unduly prejudicial, especially in light of the fact that no weapons were located in the house. Finally, the defendants urged that even if the gun was relevant, there was no evidence they were responsible for discarding it. The court ruled the gun was circumstantial evidence of consciousness of guilt in that the defendants knew the police were coming and attempted

---

<sup>5</sup> The court admonished the jurors that the “statements must only be considered as to the individual that is making the statement. In other words, the Lee Ochoa conversation is only admitted as to Lee Ochoa. The Jesse Ochoa statement, the conversation, is only admitted as to Jesse Ochoa.”

to hide incriminating evidence. The court noted that if the defense had an innocent explanation of the presence of the safe in the trash can, it was free to present it.

“We apply the deferential abuse of discretion standard when reviewing a trial court’s ruling under Evidence Code section 352.” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) “Except as otherwise provided by statute, all relevant evidence is admissible.” (Evid. Code, § 351.) One such exception is found in Evidence Code section 352, which gives the court the power to exclude evidence whose prejudicial effect outweighs its relevance. “For this purpose, ‘prejudicial’ is not synonymous with ‘damaging,’ but refers instead to evidence that “‘uniquely tends to evoke an emotional bias against defendant’” without regard to its relevance on material issues. [Citations.]” (*Kipp, supra*, at p. 1121.)

We agree with the trial court that the gun was relevant to show consciousness of guilt. It stands to reason that a person who believes witnesses will lead police to his or her home to investigate a shooting will take the necessary steps to dispose of all firearms. Defendant argues the prosecution’s theory that the gun was thrown out after the shooting is nothing more than speculation. Further, they claim there is no evidence either was responsible for discarding the gun. Not so. The facts support the inference that the gun was discarded after the shooting. Whoever threw out the gun did not take the time to get it out of the safe or attempt to cover the safe with other trash located in the can. While there may be other explanations for the presence of a safe on top of trash in a can, certainly one rational conclusion is that someone hastily attempted to dispose of the firearm after becoming aware the police were certain to arrive. It is equally reasonable to infer that one of the brothers who was arrested at the house—either defendant or Jesse—was responsible for placing the safe in the trash can or directing someone to do so.

Defendant fails to explain why the admission of the gun was unduly prejudicial. He “contends that the admission of this highly prejudicial and inflammatory evidence in the form of testimony and photographs was so fundamentally unfair as to deprive him of his federal constitutional rights to due process and a fair trial in violation of the Sixth and Fourteenth Amendments.” We are not persuaded. The jury had already heard testimony

demonstrating that defendant had taken part in a violent assault on individuals who had simply chosen to park on the street. He did so despite being told by his sister that some of the people were friends. Jimenez told police that defendant fired multiple rounds with a rifle similar to an AK-47. We fail to see how the limited testimony relating to the handgun was unduly prejudicial. We have already determined that the testimony concerning the nine-millimeter pistol was relevant. It is defendant's task to show "its probative value is substantially outweighed by the probability that its admission . . . [created] substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) He has failed to do so.

The trial court did not abuse its discretion by allowing testimony relating to the gun into evidence.

## **II. The Sufficiency of the Evidence**

Defendant contends the evidence is insufficient to support the jury's finding that the attempted murders were deliberate and premeditated. He incorporates the argument set forth in Jesse's brief. We again adopt the reasoning of our earlier opinion.

Defendant contends the evidence is insufficient to support the finding he committed willful, deliberate, and premeditated attempted murder. Relying on the principle set forth in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*) that premeditation is established by evidence of prior planning, motive, or the manner of killing, he argues there was no "proof of planning activity, a prior relationship indicating a motive to kill and a weighing of considerations rather than impetuous or rash impulse hastily executed."<sup>6</sup>

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the

---

<sup>6</sup> The test for determining if there is sufficient evidence of premeditation is the same whether the crime is murder or attempted murder. (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223.)

defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Although we generally look for evidence of planning, motive, and method of killing when determining whether a murder is premeditated, the factors set forth in *Anderson* are “descriptive, not normative.” (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) “The goal of *Anderson* was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.” (*Ibid.*) The factors are “not a sine qua non to finding first degree premeditated murder, nor are they exclusive.” (*Ibid.*)

Reviewing the evidence in the light most favorable to the judgment, we conclude there is sufficient evidence to support the verdict. The motive for the shooting is evident. The defendants wanted to get individuals they considered undesirable off their street. However, the reason was not, as defendant suggests, because they feared the strangers. Jimenez readily moved his vehicle when he was asked. Prior to the gunfire directed at Lomeli, Aguilar heard a female tell defendant and Jesse that Aguilar and Lomeli were friends. Marcus threatened a lone unarmed female sitting in a car.

Nor do we accept defendant’s claim that the shootings were the product of rash impulse. He asserts the incident proceeded so quickly there was no time to premeditate, implying that the process of deliberation is a protracted one. He is incorrect. “The act of planning—involving deliberation and premeditation—requires nothing more than a ‘successive thought[] of the mind.’ [Citations.]” (*People v. San Nicolas* (2004) 34 Cal.4th 614, 658.) “The process of premeditation and deliberation does not require any extended period of time. ‘The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .’ [Citations.]” (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

Here, the evidence established that the requisite thought and planning occurred. Jimenez told police that before anyone exhibited a weapon, defendant approached and told him to move his car. Defendant ascertained Jimenez did not belong in the neighborhood, and we infer he reached the same conclusion as to Lomeli's Blazer, which was parked across the street. Defendant did not immediately take action. Instead, he went back to the house to get weapons and reinforcements. The brothers sized up the situation after defendant delivered the news that strangers were on the street and conceived their plan. The brothers armed themselves and returned with an unarmed female (the evidence suggested this was their sister, Maria), whose part in the scheme was to stand in front of Jimenez's vehicle in order to delay his departure and allow the defendants to concentrate their firepower on both vehicles. They fired at Lomeli and then collectively directed their attention to Jimenez. Credible evidence supports the conclusion that the assault was a planned ambush, not a haphazard impulsive attack.

Substantial evidence supports the jury finding that defendant committed willful, deliberate, and premeditated attempted murder.

### **DISPOSITION**

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.